

No. 18897 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH RUIZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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sion shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, §2(h), as added July 18, 1956, c. 629, Title I, § 106, 70 Stat. 570."

III.

Statement of Case.

A. Questions Presented.

Appellant's application for a Writ of Habeas Corpus to the United States District for the Southern District of California alleged in substance that Section 176(a) of Title 21, United States Code was unconstitutional because it constituted a "conspiracy to defraud and commit a violation of law"; "constituting self-incrimination"; and "inducement to commit entrapment". Appellant also asserted generally that Section 176(a) of Title 21, United States Code was unconstitutional for the additional reason that it constituted "illegal searches and seizures, 4th Amendment of the Constitution of the United States."

Appellant sets forth under the heading *Questions Presented* [at page 11 of his brief] the following:

"(1) In that the appellant would have been compelled to testify against himself in order to comply with Title 21, U.S.C. section 176(a), wouldn't such then represent self-incrimination and thus violate the constitutional provisions of the fifth amendment provided against such?

(2) Being that the provisions and stipulations directly and indirectly concerning section 176(a), 21 U.S.C., (dealing with the burden of providing sufficient evidence to establish a violation of said section), constitute, compel and cause a resulting conspiracy (by the authorities) to defraud and commit a violation of law in order to obtain a violation of said section, than doesn't such also violate the fifth amendment of the constitution of the United States 'Due process of law'?"

It is noted that appellant's brief does not contain a "Specification of Errors relied upon" denominated as such as required by the rules of this Court,¹ and this Court has held that in the absence of such a specification an appeal presents nothing for review.²

The brief of appellant proceeding *in propria persona*, does contain two "Questions presented" which appear to be a restatement of the four "Issues Involved" as presented in appellant's application for a Writ of Habeas Corpus. These specifications, as is set out in appellant's "Notice of Appeal", "All attack the asserted unconstitutionality of subsection 176(a) of Title 21, U. S. C. and *not* the procedure of trial and sentencing". Thus it appears that the sole question raised by appellant is the constitutionality of Section 176(a) of Title 21, United States Code.

¹Rules of the U. S. Court of Appeals for the Ninth Circuit, Rule 18.

²*Herrera v. United States*, 280 F. 2d 888 (1960); *Pinkston v. United States*, 278 F. 2d 833 (1960).

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APPELLEE'S BRIEF.

I.

Statement of Pleadings and Facts Disclosing Jurisdiction.

On June 11, 1963 the appellant Joseph Ruiz filed an application for a Writ of Habeas Corpus with the United States District Court for the Southern District of California. [C. T. 2.]

On June 13, 1963 the Honorable Harry C. Westover, United States District Judge filed an Order of Dismissal denying appellant's Application for a Writ of Habeas Corpus. [C. T. 45.]

On July 9, 1963 appellant filed a Notice of Appeal. [C. T. 47.]

The jurisdiction of the United States District Court was based upon Section 2241 of Title 28, United States Code.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was based upon Sections 2241, 1291 and 1294 of Title 28, United States Code.

II.

Statutes Involved.

Section 176(a) of Title 21 United States Code provides as follows:

“§ 176a. Smuggling of marihuana; penalties; evidence; definition of marihuana

Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such posses-

IV.

Summary of Argument.

A. Section 176(a) of Title 21, United States Code is Constitutional.

V.

Argument.

A. Section 176(a) of Title 21, United States Code Is Constitutional.

The United States Court of Appeals for the Ninth Circuit has consistently held that Section 176(a) of Title 21, United States Code is constitutional. Some of the authority presently existing in the Ninth Circuit on this precise point is found in the following:

Caudillo v. United States (9th Cir. 1958), 253 F. 2d 513;

Claypole v. United States (9th Cir. 1960), 280 F. 2d 768;

Williams v. United States (9th Cir. 1961), 290 F. 2d 451;

Park v. United States (9th Cir. 1961), 296 F. 2d 123;

Butler v. United States (9th Cir. 1958), 253 F. 2d 513.

VI.

Conclusion.

The facts being uncontested, and the constitutionality of Section 176(a) of Title 21 of United States Code, having been upheld many times by this Court, the Order of the District Court denying the application for a Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

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B. Statement of Facts.

Appellant Joseph Ruiz who is presently in the custody of the Attorney General of the United States at the Federal Correctional Institution, Lompoc, California by virtue of his conviction upon his plea of guilty,³ to one count of an indictment charging the sale of 629 grams, 280 milligrams of marihuana in violation of Section 176(a) filed an application for a Writ of Habeas Corpus with the United States District Court for the Southern District of California in which application, appellant clearly states as follows:

“The plaintiff alleges that jurisdiction lies with Habeas Corpus proceedings under section 2241, 28, U.S.C., and *not* with section 2255, 28, U.S.C. for the following reasons: (1) That under section 2255, 28, U.S.C., it states ‘in part’. An application for a Writ of Habeas Corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be en-

³On May 10, 1961 the Federal Grand Jury for the Southern District of California returned an Eight Count Indictment charging appellant Ruiz and two codefendants with violations of Section 176(a) Title 21, U. S. C. Appellant Ruiz was named in Counts Three and Four only. These Counts involved the sale and concealment of 629 grams, 280 milligrams of marihuana.

On May 22, 1961, Appellant Ruiz and his codefendants were arraigned before the Honorable Harry C. Westover. On June 12, 1961 appellant Ruiz and his codefendant Padilla entered pleas of not guilty, codefendant Barajas entered pleas of guilty and the entire case was transferred to the Honorable Wm. C. Byrne for further proceedings.

On June 26, 1961 the appellant Ruiz through his retained counsel, Herman Sillas, Jr., filed a petition to enter a plea of guilty. The petition was allowed, appellant Ruiz entered a plea of guilty on Count Three, and on June 17, 1961 was sentenced to the custody of the Attorney General for a period of five years.

tertaind if it appears that that applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, *unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.*" [C. T. 2-3.]

The Honorable Harry C. Westover in denying appellant's application for a Writ of Habeas Corpus stated as follows:

"Defendant now files an Application For a Writ of Habeas Corpus", stating that § 176(a), supra, is unconstitutional and, in addition, attempts to raise issues of "c) Conspiracy and d) Entrapment".

"Inasmuch as defendant and his counsel signed and filed the PETITION TO ENTER PLEA OF GUILTY, pursuant to Rules 10 and 11 of the Federal Rules of Criminal Procedure, the issues of conspiracy and of entrapment are not matters properly before this court at this time.

"The constitutionality of § 176(a), supra, has heretofore been determined. *Williams vs United States*, 290 F.2d 451; *Claypole v. United States*, 280 F.2d 768.

"As it appears there is no merit in the contentions raised by petitioner,

"IT IS ORDERED that the Application for a Writ of Habeas Corpus is denied."

Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

GEORGE C. McCARTHY
Assistant U. S. Attorney

